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No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CARL WHORTON, KEN WHORTON, *et al.*,
Petitioners,

v.

SURTRAN TAXICABS, INC., YELLOW CAB OF DALLAS, INC., FORT WORTH CAB & BAGGAGE CO., INC., CITY OF DALLAS, TEXAS, CITY OF FORT WORTH, TEXAS, CITY OF IRVING, TEXAS, CITY OF GRAPVINE, TEXAS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether a federal court is precluded from using a retroactive state statute validating a local government's prior monopoly contract to establish "a clearly articulated and affirmatively expressed state policy" showing "the legislature contemplated the acts complained of."

II. Whether the Local Government Antitrust Act of 1984 does not permit a federal court to weigh alternative, non-existent remedies against private defendants as a ground for granting a local government defendant retrospective immunity from all remedies, legal and equitable.

LIST OF PARTIES

The parties to the proceedings below were:

Petitioners here, intervenor-plaintiff-appellants Carl Whorton et al.*

Appellants below, plaintiffs John Woolen (now deceased) et al.**

Respondents here, Surtran Taxicab, Inc., Yellow Cab of Dallas, Inc., Fort Worth Cab & Baggage Co.,*** City of Dallas, Texas, City of Fort Worth, Texas, City of Irving, Texas, City of Grapevine, Texas.

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* The Whorton-intervenor-plaintiffs represent over 200 individually named taxicab drivers.

** The Woolen individual plaintiffs and the Dallas Taxi Association were certified as class representatives.

*** Surtran Taxicab, Inc. is owned by Yellow Cab of Dallas, Inc. and Fort Worth Cab & Baggage Co. All are presumed to be closely held private corporations.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Carl Whorton, Ken Whorton, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the proceeding entitled *Woolen, et al. v. Surtran Taxicabs, Inc., et al.* on September 26, 1986.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Fifth Circuit is reported at 801 F.2d 159. It is

reprinted in Appendix A hereto and includes the opinion of the United States District Court for the Northern District of Texas.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on September 26, 1986.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The federal statutes involved are the Sherman Act and Clayton Act, 15 U.S.C. §1 et seq., and the Local Government Antitrust Act of 1984, 15 U.S.C. §35 (Supp. III, 1985). The latter Act is reprinted in Appendix B.

The state statutes involved are the Texas Motor Bus Act and Texas Municipal Airports Act. Relevant sections of the statutes are reprinted in Appendix C.

STATEMENT OF THE CASE

This case raises an antitrust challenge to local government ordinances that required taxicabs to "deadhead" from the Dallas-Fort Worth Regional Airport during the five year period 1974-1979. The Dallas-Ft. Worth Regional Airport is the only Texas joint city airport that is located outside the city limits of both cities and is circumscribed by territory not within the territorial limits of either city. City ordinances compelled taxicab owners to "deadhead," that is, to carry passengers to the airport, approximately twenty miles, and to return empty, without passengers.

This suit began in 1978 when some 200 individually named taxicab owners joined to sue in federal district court to recover treble damages against the cities and private defendants because of the damages the owners had suffered from being compelled to deadhead. These owners have been designated "the Whortons" and are the petitioners here. Their complaint was that the Dallas-Ft. Worth Joint Airport Board's grant of an exclusive franchise contract to a private corporation, partially owned by Yellow Cab of Dallas, Inc., to carry all outbound passengers from the airport was not authorized by state law and violated the Sherman and Clayton Acts. 15 U.S.C. §1 *et. seq.*, (1976). Shortly before their suit, a similar suit was filed seeking a class action for injunctive relief. A plaintiff in that suit was, among others, the Dallas Taxi Association, an association chartered by Yellow Cab of Dallas, Inc., one of the private defendants in both suits. The Whortons' individual damage action and the Dallas Taxi Association class injunctive suit were consolidated for pretrial.

In November 1978, then District Judge Patrick E. Higginbotham overruled defendants' motions for dismissal based in part on state action immunity. He held the exclusive contract and deadheading requirement were not immunized by the state action defense and must stand trial under the rule of reason. *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025 (N.D. Tex. 1978). The consolidated cases were transferred to Judge Mary Lou Robinson. Two years later in December 1980, after discovery limited to the class certification issue, Judge Robinson certified a Federal Rule of Civ. Proc. 23(b)(2) injunctive class, named the Dallas Taxi Association and its lawyer as the class

representative, denied the individual Whorton drivers the right to opt-out, and denied their alternative motion to intervene. On appeal by the Whortons, the Fifth Circuit declined to rule on their right to opt out but reversed the denial of intervention and remanded in August, 1982. *Woolen v. Surtran Taxicabs*, 684 F.2d 324 (5th Cir. 1982). For three years, Judge Robinson continued her stay of discovery on the merits until August 8, 1985 when she dismissed as to all defendants.

Substantial changes occurred during the interim period. Shortly after Judge Higginbotham ruled in 1978, the first five year exclusive contract expired in 1979. After this lawsuit was filed, and in response to the inefficiency and to public protest, the Dallas-Ft. Worth Joint Airport Board and the cities modified the exclusive monopoly contract and compulsory deadheading, and changed to a system allowing access by all taxicabs to the outbound business by paying a pickup fee. These changes substantially mooted prospective injunctive relief in the pending suits.

In 1983, the Texas legislature then amended the Municipal Airports Act to add the provision that:

> (d)(6) Taxicab Licensing . . . [A] joint airport board . . . shall have power to license taxicabs picking up passengers at or delivering passengers to the airport.

Ch. 626, 1983 Tex. Gen. Laws, at 4015, TEX. REV. CIV. STAT. ANN. art. 46d-14(d)(6) (Vernon Supp. 1985). Section 2 of a different amending Act, added the provision that Judge Robinson subsequently found

"validated" the prior exclusive joint board monopoly contract from 1974 to 1979:

> Any and all contracts, leases, or other arrangements for the use or occupancy of airport property executed by joint boards . . . prior to the effective date of this Act, are hereby validated and confirmed and the same are fully effective and represent the lawful agreements and undertakings of joint boards in accordance with the terms thereof.

Ch. 978, 1983 Tex. Gen. Laws, at 5322, 5323, TEX. REV. CIV. STAT. ANN. art. 46d-14(d) note (Vernon Supp. 1985). App. C-II.

On August 8, 1985, Judge Robinson granted the defendants' motions to dismiss and for summary judgment. Among other grounds, she ruled that "[f]or purposes of antitrust analysis, the [1983] validation statute itself, by validating and confirming the contracts in question, is an adequate indication" of state policy. 615 F. Supp. at 349, 801 F.2d at 163. In the alternative, she ruled that the Local Government Antitrust Act of 1984, 15 U.S.C. §35 (Supp. III, 1985), allows the federal court to consider alternative relief to private defendants as a ground for granting retroactive immunity from damage remedies to the local government. 801 F.2d at 165. But in the remaining part of her opinion, Judge Robinson denied all relief against the private defendants under the *Noerr-Pennington* doctrine. The Whorton intervenor-plaintiffs, as well as the other plaintiffs, appealed. On September 26, 1986 the Fifth Circuit affirmed in a per curiam opinion on the basis of the district court's opinion.

REASONS FOR GRANTING THE PETITION

I. THE TEST FOR DECIDING WHETHER A STATE POLICY AUTHORIZING MUNICIPAL ANTICOMPETITIVE ACTIVITY EXISTS IS A PROSPECTIVE TEST TO BE APPLIED BEFORE THE ACTIVITY, AND NOT A RETROACTIVE TEST, TO BE APPLIED AFTER THE ACTIVITY.

A.

Parker v. Brown, 317 U.S. 341 (1943) held that under the "state action" doctrine, a cartel of raisin growers was immune under the federal antitrust laws because a California statute enacted prior to the anticompetitive activity authorized the price fixing monopoly. However, in dictum this Court implied that the test for measuring the grant of immunizing state authority is to be applied prospectively and not retroactively:

> [*A*] *state does not give immunity to those who violate the Sherman Act by* authorizing them to violate it, or by *declaring that their action is lawful.*

317 U.S. 341, 351 (1943) (emphasis added).

Thus it seems clear that if the state statute in *Parker v. Brown* had been passed after, rather than before the anticompetitive activity, the Court would not have allowed immunity for the period before the passage of the statute.

B.

Forty years later, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), although upholding the state action defense on the basis of pre-existing stat-

utes, restated the judicial test that had evolved. That test requires a " 'clearly articulated and affirmatively expressed' " state policy in statutes showing that " '*the legislature contemplated the kind of action complained of.*' " (emphasis added) (citation omitted). *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, at 44 (1985). The plain meaning and purpose of this test is to require that the state statute expressing state policy pre-exist the activity, and, by implication, to preclude the state from retroactively establishing its policy and authority by a ratification statute attempting to legalize prior anticompetitive activity. See also *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985).

C.

Since the date of the *Town of Hallie* decision, apparently all federal circuit court decisions applying the *Hallie* test have found municipalities immune on summary motions. Nevertheless, all circuits, although reaching results favoring the local governments, have restated the rule in *Hallie* to require that the proper test is a prospective one of *foreseeability*, and not a retroactive test of ratification. For example, the Second Circuit in *Cine 42nd Street Theater Corp. v. Nederlander Org.*, 790 F.2d 1032, 1042 (2d Cir. 1986) stated: "The Court thus indicated *the test should be one of foreseeability*—whether the legislature could foresee the anticompetitive effects that would follow from the express authority the state had delegated to its cities." (emphasis added). See also *Montauk-Caribbean Airways v. Hope*, 784 F.2d 91, 95 (2d Cir. 1985), *cert. den.*, ___U.S. ___(1986).

The foreseeability standard, or versions of it, have been articulated in other circuits as well. *La Salle*

Nat. Bank of Chicago v. County of DuPage, 777 F.2d 377 at 381 (7th Cir. 1985), *cert. den.*, ___U.S. ___ (1986); *Mercy-Peninsula Ambulance v. San Mateo County*, 791 F.2d 755, 757 (9th Cir. 1986); *Grason Elec. v. Sacramento Mun. Utility Dist*, 770 F.2d 833, 836 (9th Cir. 1985), *cert. den.*, ___U.S. ___(1986); *Auton v. Dade City, Florida*, 783 F.2d 1009, 1011 (11th Cir. 1986); *L & H Sanitation v. Lake City Sanitation*, 769 F.2d 517, 520 (8th Cir. 1985); *Mass. Furniture & Piano Movers Ass'n v. F.T.C.*, 773 F.2d 391, 396 (1st Cir. 1985).

D.

The Fifth Circuit in this case adopted a retroactive, rather than a prospective test in conflict with *Parker, Hallie* and other circuits. Although reciting and claiming consistency with these decisions, the district court's opinion characterized the 1983 Texas legislation as a "validation" statute "itself" supplying the necessary evidence of state policy to meet the *Hallie* test during the period of the 1974-79 exclusive monopoly contract:

> For purposes of antitrust analysis, the validation statute itself, by validating and confirming the contracts in question, is an adequate indication of the state's desire to allow joint airport boards to displace competition through anticompetitive measures in the area of taxicab services to municipal airports. 801 F.2d at 163.

The above quoted passage implies that the retroactive test embodied in the statement and employed by the court was essential to establish a state policy au-

thorizing the monopoly contract governing the period 1974-79.

E.

The retroactive test endorsed by the Fifth Circuit cannot be dismissed as surplusage and dictum on the theory that even without considering the 1983 legislation, there was pre-existing statutory authority for the 1974-79 contract. Judge Patrick E. Higginbotham, then district judge, in overruling motions to dismiss based on the state action doctrine, had already ruled in 1978 that the cities and the joint airport board at that point in time did not have state authority to enter into an exclusive taxicab contract on outbound business at the joint regional airport and their arrangement must stand trial under the rule of reason. *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025 (N.D. Tex. 1978). His opinion also clearly implied that if regulatory authority over taxicabs traveling back and forth between city limits and territorial limits of the Dallas-Ft. Worth Airport were also subject to regulation by the Texas State Railroad Commission, and not subject to exclusive regulatory authority by the cities and the joint airport board, then a State Railroad Commission certificate was not proof of the State's intent to validate the monopoly contract on outbound business. 461 F. Supp. at 1032, 1033.

Professor Areeda endorsed Judge Higginbotham's ruling saying "[i]t is both unusual and inefficient to require other cabs leaving passengers at the airport to return empty to the city." P. AREEDA & D. TURNER, ANTITRUST LAW (1978, Supp. 1982), at 54; see also Cirace, *An Economic Analysis of the "State-*

Municipal Action" Antitrust Cases, 61 Tex. L. Rev. 481, 503 (1982).

Nevertheless, the Fifth Circuit here found *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir.), *cert. denied*, ___U.S. ___(1985) "virtually indistinguishable." 801 F.2d at 161. The Fifth Circuit rejected the specious distinctions urged by the Dallas Taxi Association "plaintiffs" that there was a difference of ownership and a "regulatory void" at the DFW Regional Airport. 801 F.2d at 162. But the Fifth Circuit failed even to acknowledge the important, real and valid distinctions urged by the Whorton intervenor-plaintiffs that unlike taxi transportation through contiguous territory subject to exclusive local legislative power at the Houston airport, the transportation to and from the Dallas-Ft. Worth Regional Airport territory crossed through territory subject to power of other municipalities and reserved by the State to the State Railroad Commission.

This distinction, based upon the allocation of dual regulatory power and of territorial power between state and city governments follows the analogous distinction recognized by this Court in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). The state-local-territorial power distinction is the basis for this Court's restraint against parochial interests of one municipality unreasonably controlling unrepresented municipalities in a regional market. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 404-406 (1978); Hovenkamp & Makerron, *Municipal Regulation and Federal Antitrust Policy*, 32 U.C.L.A. L. Rev. 719 (1985) (advocating that the courts use a territorial approach to the state action defense).

Because it was necessary in 1983 to amend the Motor Bus Act, TEX. REV. CIV. STAT. ANN. art. 911a, §1(c) to remove the mandatory regulatory power of the State Railroad Commission, see App. C, and this was an integral part of amendments to the Municipal Airports Act transferring power to the joint airport board, then both as a matter of law and as a matter of the district court's characterization, the 1983 retroactive "validating" legislation was essential to establish statutory authority in the joint airport board for the period 1974 to 1979.

The district court and Fifth Circuit, however, assumed that if the State Railroad Commission had potential, but unexercised, authority in the time period 1974-79 to authorize an exclusive contract on outbound taxicab service through multiple counties and cities, then it was irrelevant that the DFW Joint Airport Board had usurped the State Railroad Commission's authority prior to 1983. Thus the Fifth Circuit endorsed and applied, not the required, prospective "clearly expressed and articulated" standard of preexisting power in the local government, but a retroactive, imprecise "suggestion" standard of power in the State agency: "This [1983] clarifying legislation does not suggest that no power to regulate existed before its enactment. The validating statute suggests just the opposite." 801 F.2d at 163.

But what prior state statute embodied the state policy? The Dallas-Fort Worth Joint Airport Board under the Municipal Airports Act had no jurisdiction, and the Texas State Railroad Commission had jurisdiction but no articulated policy and furthermore had not exercised its jurisdiction. *Woolen v. Surtran Taxicabs*, 461 F. Supp. at 1032, 1033 (N.D. Tex. 1978).

The Fifth Circuit's opinion also misconceived the anti-monopoly intent of the 1983 Texas legislature as to future state policy after 1983. The intent of the 1983 Texas legislature was to terminate the Yellow Cab monopoly at the Dallas-Ft. Worth Regional Airport, and not as the Fifth Circuit implies, to create prospective and retrospective economic regulatory power in the DFW Joint Airport Board to reinstitute the regional taxicab monopoly. As Governor Mark White stated:

> Specifically, my concern that the original bill placed the State in the position of legislating a monopoly for a single taxi company, while preventing free market competition, has been sufficiently addressed. . . .
>
> Rumors that there would be a veto of this legislation should be put to rest.

(Press Release, May 27, 1983). App. D.[1]

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[1] Governor White's statement refers to the 1983 amendment of the Motor Bus Act, TEX. REV. CIV. STAT. ANN. art. 911a §1(c) that was an integral part of the 1983 amendments to the Municipal Airports Act. As set forth in the Whorton appellants' Fifth Circuit Reply Brief and Statutory Appendix, the legislative history of multiple bills integrated into the 1983 and 1985 legislation is complex. In addition to an anti-monopoly goal, the final outcome shows that the 1983 Texas legislature drew a clear distinction between solely municipal airports under TEX. REV. CIV. STAT. ANN. art. 14d-4(a)(2), such as Houston, and powers over taxicabs at the Dallas-Ft. Worth joint airport under Article 14d-14(d)(6), that were subject to mandatory State Railroad Commission regulation until the legislature removed its power over such taxicabs, abortively in 1983, and finally, successfully in 1985. See App. C. The following cases therefore are distinguishable, primarily on the grounds that authorizing state statutes

F.

Multiple policies based upon antitrust law, federalism and legal order support the need for this Court to reaffirm its prospective rule and reject the Fifth Circuit's retrospective rule. Otherwise, as a practical matter, local governments and dominant private interests, as here, will engage in anticompetitive monopoly contracts with impunity. For they know that if and when they are challenged, because the State has an interest in immunizing the local government from damages, the State will retroactively validate the contracts, on condition the local government cease its anticompetitive monopoly. But in the interim the damage has been done. Such a boot-strap system of retroactive authority leaves a loophole seriously emasculating the power of Congress to define and to prohibit anticompetitive activity because the victims of the prohibited anticompetitive behavior will be left remediless. Different future victims, learning that lesson, will not litigate without a remedy. They also will be left to ponder the coherence of a legal order that allows federal rules governing local government activity to be changed retroactively by the State.

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were pre-existing and not retroactive, and on the secondary ground that they involved transportation in territory exclusively within the legislative power of the local government at the time of the monopoly contract. *Executive Town & Country Services v. City of Atlanta*, 789 F.2d 1523, 1525, 1529 (11th Cir. 1986); *Commuter Transportation Systems v. Hillsborough County Aviation Authority*, 801 F.2d 1286, 1288 (11th Cir. 1986); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 95, 96 (2d Cir. 1985), *cert. den.*, ___U.S. ___(1986); *Golden State Transit v. City of Los Angeles*, 726 F.2d 1430, 1434 (9th Cir. 1984), *rev'd on other grounds*, 88 L.Ed.2d 616 (1986).

The policies at stake here are the same as, yet the converse of, those in *Mitchell v. Forsyth*, 453 U.S. 913 (1985). That decision restates that in order to overcome a defense of qualified immunity, the plaintiff must establish "*the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. . . .*" (emphasis added), 105 S.Ct. at 2816. For analogous policy reasons necessary to a fundamental legal order, to practical administration, and to federalism, the petitioners respectfully urge that this Court expressly state that a local government, in order to invoke the state action defense, must show that the "clearly articulated and affirmatively expressed state policy" was in existence "at the time of the challenged actions." *Cf. Huron Valley Hospital v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986).

II. CONGRESS INTENDED THAT THE GRANT OF RETROACTIVE IMMUNITY TO LOCAL GOVERNMENTS FROM THE DAMAGE REMEDY BE CONDITIONED UPON THE EXISTENCE OF ALTERNATIVE EQUITABLE RELIEF AGAINST THE LOCAL GOVERNMENT, AND NOT UPON ALTERNATIVE NON-EXISTENT RELIEF AGAINST PRIVATE DEFENDANTS.

The Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (Oct. 24, 1984), states, in relevant part, in sections 3(a) and (b):

> (a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

> (b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

15 U.S.C. §35 (Supp. III, 1985).

The district court invoked section 3(b) as an alternative ground for dismissal of damages remedies against the local government defendants. The standard endorsed by the Fifth Circuit is not the most easily understood:

> '[A]s either of the two factors . . . stage of litigation and availability of alternative relief under the Clayton Act . . . moves towards weighing against retroactive application, the defendant's burden to establish that denial of such application would be inequitable becomes more difficult.' 801 F.2d at 165 (citation omitted).

Even aside from the district court's hostile, inequitable characterization of the stage of the litigation here,[2] the Fifth Circuit employed an erroneous legal

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[2] Mechanically it is true that discovery on the merits had not been completed in 1985. However, after Judge Higginbotham's

standard by weighing alternative relief against private defendants as a ground for denying total relief against the government defendants (801 F.2d at 167):

> '[I]n looking to the availability of alternative relief under the Clayton Act, the court would assess whether a plaintiff could recover damages from a private party and whether an injunction would be sufficient to halt continuing injury caused by an ongoing antitrust violation.' (citation omitted). . . .
>
> Both criteria are met in these cases.[2] Each case has three defendants which are not local governments—Surtran Taxicabs, Yellow Cab of Dallas, and Fort Worth Cab & Baggage Co.—and which could be held liable for money damages, if not otherwise exempt from the antitrust laws.

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major ruling in 1978, substantial discovery had been taken for the class certification hearing, generating a seven volume record. Since 1979, Judge Robinson had stayed discovery on the merits, and resisted the Whortons' attempts to bring the case to jury trial, including their Pyrrhic victory on the first appeal. *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324 (5th Cir. 1982). In the interim, defendants were benefited by the 1983 state legislation validating their contracts, and the 1984 federal immunity legislation. *Compare, Miami Intern. Realty v. Town of Mt. Crested Butte*, 607 F. Supp 448 at 453 (D. Colo. 1985). Similarly, the district court's opinion, as endorsed by the Fifth Circuit, on summary judgment mechanically found and endorsed the defendants' version of the facts, including the abstract label "single operator concept" and did not report or analyze the record evidence raising factual questions under the sham bidding exception to *Noerr-Pennington*.

> [2] As an alternative ground for dismissal, this analysis proceeds as though the state action exemption did not apply, thus making the availability of alternative relief a reality. (801 F.2d 167).

This standard is based upon Senator Cranston's remarks made on October 4, 1984. 130 Cong. Rec. S13,105 (daily ed. Oct. 4, 1984). Senator Cranston was not a Senate conference manager. Senator Metzenbaum was a Senate manager and stated on October 11, 1984:

> None of those House Members and none of us here in the Senate have the authority, have the strength, have the legal right to change the legal effect of what the conferees concluded in their language, nor can we change the statement of the managers. Only the statement of the managers accurately reflects the congressional intent in this area, and there is no way of changing that.

130 Cong. Rec. S14,368 (daily ed. Oct. 11, 1984) (statement of Sen. Metzenbaum).

As extracted from the House Conference Report dated October 10, 1984, (H. R. Rep. No. 98-1158 at 3 (Oct. 10, 1984), U.S. Code Cong. & Admin. News 1984 at 4602, 4626-27), the proper standard of law is stated in *Miami Intern. Realty v. Town of Mt. Crested Butte*, 607 F. Supp. 448, at 454 (D. Colo. 1985):

> The legislative history clearly indicates that Congress contemplated that relevant alternative remedies would consist solely of Clayton Act injunctive relief against the municipal defendant, rather than damage relief from other private defendants.

The legislative history and language of section 3(b) contemplate a sensitive balancing, according to traditional equity principles. See Mayo, *The Local Government Antitrust Act, A Comment on the Constitutional Questions*, 50 J. Air L. & Com. 805, 811 (1985). Even if alternative relief against private defendants can be weighed, traditional equitable principles are perverted when, as here, the Fifth Circuit affirmatively weighed nonexistent remedies against the private defendants.

The district court's opinion also fairly implied the court would allow no retrospective equitable monetary relief for past injuries. 801 F.2d at 167 and 168. However, the Act requires the local government to show the retroactive bar of the treble damage remedy would not be "inequitable." The maxim is not yet dead that "[h]e who seeks equity, must do equity." Z. CHAFFEE JR. & E. RE, EQUITY 11 (5th ed. 1967). By placing the affirmative burden on the local government to show that denial of the damage remedy would be "[ ]equitable," Congress incorporated this equitable maxim that the court may provide retrospective equitable relief against the government as a condition of granting it affirmative equitable relief, *i.e.* here, immunity from treble damages. See *Ehrlich v. United States*, 252 F.2d 772 at 776 (5th Cir. 1958) (Wisdom, J.). The proper construction of the Local Government Antitrust Act would be to fashion an appropriate retrospective equitable remedy against the local government as an equitable condition to the retroactive grant of immunity from the damages remedy. See *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 250-51, (3d Cir.), *cert. den.*, 421 U.S. 1011 (1975). This statutory solution is preferable because, it is sub-

mitted, the Eleventh Amendment is not implicated. *Cf. Green v. Mansour*, 106 S.Ct. 423 (1985).

The retroactive test for state policy and denial of retrospective equitable relief against the local governments, based upon non-existent alternative remedies applicable to private defendants combine to create a result that Congress did not intend. Congress did not intend that cities and private defendants should be able to engage in antitrust violations for a five year period, and then when challenged in federal court, to cease the practice and to obtain state legislation retroactively validating the violations, and thereby to escape all liability and leave the victims remediless.

CONCLUSION

Local governments do not have sovereign immunity from liability and from federal court remedies under anti-trust laws. However, since the date of the Local Government Antitrust Act and *Town of Hallie*, the federal courts have swung the pendulum almost to the point of automatic immunity. The Fifth Circuit's endorsement of a retroactive rule for measuring state policy and its approval of a principle denying retrospective equitable relief on grounds of non-existent alternative private relief as a practical matter have reached that extreme. If the Court wants to draw a balance point short of per se immunity, this case presents just cause.

For these reasons, petitioners respectfully request this petition for writ of certiorari be granted.

Respectfully submitted,

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Date: December 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1564

JOHN WOOLEN, *et al.*,
Plaintiffs,
JOHN D. CAMPISI, Individually and as Class Action Plaintiffs, *et al.*,
Plaintiffs-Appellants,
and
CARL WHORTON, *et al.*,
Intervenors-Appellants,
v.

SURTRAN TAXICABS, INC., *et al.*,
Defendants-Appellees.

KEN WHORTON, *et al.*,
Plaintiffs-Appellants,
v.

CITY OF DALLAS, TEXAS, *et al.*,
Defendants-Appellees.

OPINION

Filed September 26, 1986

Before: Thomas Gibbs Gee, Carolyn Dineen Randall and W. Eugene Davis, Circuit Judges.

Per Curiam

Appeals from the United States District Court
for the Northern District of Texas
Mary Lou Robinson, District Judge, Presiding

OPINION

PER CURIAM:

We affirm the judgment of the district court on the basis of its careful opinion which is attached as Appendix A.

AFFIRMED.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION NO. 3-78-609
CONSOLIDATED WITH:
CIVIL ACTION NO. 3-78-745

JOHN WOOLEN, *et al.*,

Plaintiffs,

VS.

SURTRAN TAXICABS, INC., *et al.*,

Defendants.

ORDER

The factual allegations in these antitrust actions have already been reported twice and need not be repeated at length here. See *Woolen v. Surtran Taxicabs*, 461 F.Supp. 1025 (N.D. Tex. 1978) (denying motions to dismiss); *Woolen v. Surtran Taxicabs*, 684 F.2d 324 (5th Cir. 1982) (vacating order denying intervention). In a nutshell, the plaintiff taxicab drivers claim that the defendants have excluded them from the outbound taxicab market at the Dallas/Fort Worth Regional Airport since the airport's opening in 1974, in violation of the Sherman Act.

Recent antitrust law developments, most notably passage of the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (Oct. 24, 1984) (to be codified in 15 U.S.C. § 35), and the recent decisions in *Town of*

Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985); *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721 (1985); and *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir. 1985), now require that three issues be addressed, including one previously decided in the original district court opinion in this case:[1]

I. Should these consolidated actions be dismissed because the Defendants' challenged activities are immune from scrutiny under the antitrust laws by virtue of the state action exemption?

II. Should the Plaintiffs' claims under § 4 of the Clayton Act for damages, interest on damages, costs and attorney's fees against the defendant cities be dismissed under § 3 of the Local Government Antitrust Act of 1984?

III. Should the Plaintiffs' claims against the private taxi company defendants be dismissed as barred under the *Noerr-Pennington* doctrine?

For the reasons set forth below, the Court answers each question in the affirmative.

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[1] After these actions were filed in 1978, all defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, each asserting the state action exemption. These motions to dismiss were denied in the original district court opinion, 461 F.Supp. at 1031-33. On May 24, 1985, the Court issued an Order stating that it would reconsider these motions in light of subsequent authority. All parties submitted new briefs. On June 28, 1985, the private defendants—Surtran Taxicabs, Inc., Yellow Cab of Dallas, Inc., and Fort Worth Cab & Baggage Company, Inc.—moved for summary judgment under Rule 56, asserting the state action exemption and *Noerr-Pennington* immunity.

The issues concerning the Local Government Antitrust Act of 1984 were raised by the Court in an Order issued December 6, 1984. In response to that Order, each party filed papers addressing the applicability of the Act's provisions.

I. The State Action Exemption

A. The Municipal Defendants

In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court, relying on principles of federalism and state sovereignty, determined that the Sherman Act does not apply to the anticompetitive conduct of a state acting through its legislature. *Id.* at 350-51. Thirty-five years later, the Court also held that municipalities are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978). These actions were filed shortly after *City of Lafayette* was decided.

City of Lafayette did not completely prohibit municipalities from claiming the state action exemption. Instead, the plurality opinion suggested that the state action doctrine "exempts only anticompetitive conduct engaged in as an act of government . . . [by a political subdivision of the state] pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413. The opinion went on to explain:

> This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense . . . [A]n adequate state mandate for anticompetitive activities . . . exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated that kind of action complained of."

435 U.S. at 419 (citation omitted). Finally, "*City of Lafayette* suggested, without deciding the issue, that it would be sufficient to obtain *Parker* immunity for a municipality to show that it acted pursuant to a 'clearly articulated and affirmatively expressed . . . state policy' that was 'ac-

tively supervised' by the State." *Town of Hallie,* 105 S. Ct. at 1717, quoting *City of Lafayette,* 435 U.S. at 410.

Considerable debate ensued over what would constitute an adequate articulation and expression of state policy, and what would constitute active supervision. In *Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982), the Court held that a home rule provision of the Colorado Constitution which allocated only the most general authority to municipalities to govern local affairs did not satisfy the clear articulation component of the state action test. The opinion also suggested that whether active supervision by the state of the anticompetitive conduct was required was an open question, despite the plurality opinion in *City of Lafayette.* 455 U.S. at 51-52, n.14.

Noting that "[i]t is fair to say that our cases have not been entirely clear," 105 S.Ct. at 1720, the Court resolved much of the debate in *Town of Hallie.* A unanimous Court reiterated that the state action exemption applies whenever the state legislature has "clearly articulated and affirmatively expressed" a state policy to displace competition in the regulated area. *Id.* at 1719. The Court further held that "although compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to a clearly articulated state policy." *Id.* Finally, the Court concluded that the "active state supervision requirement should not be imposed in cases in which the actor is a municipality." *Id.*

The Fifth Circuit has applied *Town of Hallie* in a case which is virtually indistinguishable from the instant actions. In *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.,* 760 F.2d 607 (5th Cir. 1985), the City of Houston had entered into a contract with the Greater Houston Transportation Corporation by which the City granted an exclusive concession over passenger service at Houston Intercontinental Airport. Two

groups of taxicab owners and operators filed suit under the Sherman and Clayton Acts, seeking damages and injunctive relief from the City and its private contractor. The district court dismissed the complaint on defendants' motion for summary judgment, holding that the City was immune from antitrust scrutiny under the state action exemption and that the private contractor was immune under the *Noerr-Pennington* doctrine. The Fifth Circuit affirmed.

The Court's analysis focused on the relevant provision of the Texas Municipal Airport Act, which authorizes municipalities to establish and operate airports both within and without their boundaries. Article 46d-4 provides:

> (a) In operating an airport . . . such municipality may . . . enter into contracts . . . and other arrangement for a term not exceeding forty (40) years with any persons:
>
> . . .
>
> (2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport. . . .
>
> . . .
>
> In each case the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services. . . .

Tex. Rev. Civ. Stat. Ann. art. 46d-4 (Vernon 1969). The Fifth Circuit said:

> While the latter provision falls short of expressly mentioning the establishment of ground transportation services, the statute's broad phrasing is a strong indication of the state's desire to abdicate in favor of municipal prescience with regard to airport management.
>
> This indication is all we require. . . . We think it . . . clear that the City of Houston might deem

> it most efficient to confer the privilege of airport taxicab operation on a single company, and that such a decision is a logical or reasonable consequence of the state's broad allocation of authority to the City to run its own airport.

760 F.2d at 610-11. The Fifth Circuit also disposed of the question concerning the impact of Article 46d-7(c)—a major stumbling block in the first district court opinion in this case, *see* 461 F.Supp. at 1031:

> Similarly, it is of limited significance that the statute authorizing municipal airport management states that the municipality's actions shall not be "inconsistent with, or contrary to, any Act of the Congress of the United States. . . ." [Article 46d-7(c).] The relevant question is not whether the City has transgressed federal law, but whether the Sherman & Clayton Acts apply to the City at all.

760 F.2d at 612, n.8.

Plaintiffs seek to distinguish *Independent Taxicab* on two grounds: (1) Houston Intercontinental is wholly owned and operated by the City of Houston, whereas the Dallas/Fort Worth Regional Airport is jointly owned and operated by the Cities of Dallas and Fort Worth, and (2) recent statutory amendments demonstrate that taxicab operations at jointly owned and operated airports were in a "regulatory void" until 1983.

The first argument is of no import. The Cities of Dallas and Fort Worth operate the airport through the Dallas/Fort Worth Regional Airport Board, a joint board created under § 14 of the Municipal Airport Act, Article 46d-14. That section provides, in relevant part:

> (a) For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality. . . .

> (b) Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint . . . operation of airports. . . . Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. . . .
>
> (c) . . . The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport . . . to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport. . . .

The Regional Airport Board is designed as a mechanism for joint action. That the defendant cities in these actions operated through the Regional Airport Board on a jointly owned airport, instead of on their own on individually owned airports, does not affect their state action exemption. "[T]he state's desire to abdicate in favor of municipal prescience with regard to airport management" is equally clear in both instances. The decision to grant an exclusive airport taxicab franchise—to utilize the "single-operator concept," in the parlance of these actions—is a logical and reasonable consequence of the State's broad allocation of authority to cities to jointly acquire, own and operate municipal airports.

Defendants second argument is based on legislation passed in 1983. The Obstruction to Air Navigation Control and Taxicab Licensing Act, 1983 Tex. Gen. Laws, ch. 626, at 4015, amended § 14 of the Municipal Airport Act to provide that:

> (d)(6) Taxicab Licensing. . . . [A] joint airport board . . . shall have power to license taxicabs picking up passengers at or delivering passengers to the airport.
>
> (7) Regulations. Any resolution, rules, regulations, or orders of the joint airport board dealing with subjects authorized by Subdivision (65) of this subsection become effective only upon approval of the governing bodies of the constituent public agencies.

Article 46d-14(d)(6)-(7) (Vernon Supp. 1985). While this statute was not enacted until well after the bulk of the actions challenged in these suits, it is significant as an indication of state policy, particularly when read in conjunction with § 2 of the Municipal Airport Act Amendments of 1983, 1983 Tex. Gen. Laws, ch. 978, at 5322, which provides:

> Any and all contracts, leases, or other arrangements for the use or occupancy of airport property executed by joint boards created under the Municipal Airports Act (Article 46d-1 et seq., Vernon's Texas Civil Statutes), and all provisions thereof, and executed prior to the effective date of this Act, are hereby validated and confirmed and the same are fully effective and represent the lawful agreements and undertakings of joint boards in accordance with the terms thereof.

From these enactments, Plaintiffs draw the conclusion that no governmental entity had any power to regulate taxicab service at the airport until September of 1983. The opposite is true.

The amendment to § 14 of the Municipal Airport Act was designed to clarify the role of joint airport boards in regulating taxicab service at joint airports because of uncertainties that might have arisen from concurrent legis-

lation which clarified the role of the Railroad Commission in establishing licensing requirements under the Motor Bus Act, Article 911a. See 1983 Tex. Gen. Laws, ch. 263, at 1161. This clarifying legislation does not suggest that no power to regulate existed before its enactment. The validating statute suggests just the opposite.

The plaintiffs' operations at the airport were limited because ground transportation service was provided by means of a single-operator concept. The Cities of Dallas and Fort Worth own the airport and, as noted above, operate it through the Dallas/Fort Worth Regional Airport Board. The Cities of Dallas and Fort Worth contracted with the Airport Board to provide ground transportation under the single-operator concept. To meet their obligations to the Board, the Cities of Dallas and Fort Worth formed an entity known as the D/FW Surtran System. The System then solicited bids for the provision of the taxicab component of the ground transportation services. Yellow Cab of Dallas and Fort Worth Cab & Baggage formed an entity known as Surtran Taxicab, Inc., which submitted the winning bid. The D/FW Surtran System then contracted with Surtran Taxicab, Inc., for the provision of taxicab service at the airport. The single-operator concept, then, originated in the first agreement between the Airport Board and the Cities of Dallas and Fort Worth. The 1983 validation statute confirms that, under state law, the single-operator concept was lawful.

For purposes of antitrust analysis, the validation statute itself, by validating and confirming the contracts in question, is an adequate indication of the state's desire to allow joint airport boards to displace competition through anticompetitive measures in the area of taxicab services to municipal airports.

The Court concludes that Plaintiffs' actions against the Cities of Dallas, Fort Worth, Grapevine and Irving should be dismissed because the challenged conduct is immune

from scrutiny under the antitrust laws by virtue of the state action exemption.

B. The Private Defendants

In a companion case to *Town of Hallie*, the Supreme Court outlined the criteria a private party must satisfy to fall within the state action exemption. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.' Second, the State must supervise actively any private anticompetitive conduct." *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721, 1727 (1985) (citations omitted). The Court explained the reason for extending the state action exemption to private parties:

> The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate domestic commerce. If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a State would be unable to implement programs that restrain competition among private parties. A plaintiff could frustrate any such programs merely by filing suit against the regulated private parties, rather than the state officials who implement the plan. We decline to reduce *Parker*'s holding to a formalism that would stand for little more than the proposition that Porter Brown sued the wrong parties.

Id. at 1726-27. Instead, "[t]he success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant." *Id.* at 1728.

The private defendants have met the first prong of the test. As discussed above, the single-operator concept re-

sulted from the state's clearly articulated and affirmatively expressed "desire to abdicate in favor of municipal prescience with regard to airport managment." 760 F.2d at 610. Because the Cities of Dallas and Fort Worth determined that the single-operator concept would be used at the airport and solicited bids only on this basis, it is fair to say that the private defendants, who simply submitted a bid, were compelled to participate in the anticompetitive activity if they wanted to provide taxicab service at the airport. As the Court said in *Southern Motor Carriers*, "compulsion often is the best evidence that the State has a clearly articulated and affirmatively expressed policy to displace competition." 105 S.Ct. at 1729.

The active supervision requirement—the second prong of the test—"prevents the state from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *Id.* at 1729, quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). "[T]he state supervision requirement is intended to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the clearly articulated and affirmatively expressed state policy at stake." *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1014 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 1864 (1985).

Midcal involved a challenge to a California wholesale wine pricing system that the Court found resulted in a de facto resale price maintenance program. The Court held that the system was a clearly articulated state policy, but that it did not meet the active supervision requirement:

> The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor

> does it regulate the terms of fair trade contracts. The States does not monitor market conditions or engage in any "pointed reexamination" of the program.

455 U.S. at 105-106.

In the instant actions, there is no doubt that the Cities of Dallas and Fort Worth, and the Regional Airport Board, have actively supervised the private defendants' conduct. The details of taxicab service at the airport are set forth comprehensively in the contracts between D/FW Surtran System and Surtran Taxicabs, Inc., attached to the complaints. Further, the successive contracts show a gradually changing approach to ground transportation at the airport. For example, the 1979 Contract allows Surtran Taxicabs to subcontract with other taxicab companies for provision of service at the airport.

The Court concludes that the Plaintiffs' actions against the private defendants should be dismissed because the challenged conduct is immune from scrutiny under the antitrust laws by virtue of the state action exemption.

II. The Local Government Antitrust Act of 1984

The second question before the Court is whether the plaintiffs' claims for damages, interest on damages, costs and attorney's fees against the cities should, in the alternative, be dismissed under § 3 of the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (Oct. 24, 1984) (to be codified in 15 U.S.C. § 35), which provides:

> (a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

> (b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

Section 3(b) of the Act "was a compromise between those Congressmen who thought that retroactive application was not in accord with Congress' traditional approach to changing existing law and those who felt that denial of retroactive application would unjustly penalize those localities that were defendants in pending suits for treble damages." *Jefferson Disposal Co. v. Parish of Jefferson,* 603 F.Supp. 1125, 1131 (E.D. La. 1985).

There is no dispute that these cases were commenced before the effective date of the act and that the cities of Dallas, Fort Worth, Grapevine and Irving are local governments within the meaning of § 2(1)(A) of the Act, 15 U.S.C. § 34(1)(A). The question, then, is whether it would be inequitable not to apply § 3(a) retroactively on the facts of these cases.

The Joint Explanatory Statement of the Conference Committee, which accompanied the Conference Report on the Bill, discusses the application of the Act to pending cases:

> The application to pending cases of the money damage protection afforded by § 3 will be based upon a case-by-case determination by the district court. The local government has the burden of proof to establish to the court's satisfaction that

> it would be inequitable not to apply this Act to the pending case. The court is to consider all relevant circumstances. The statute mentions two of the factors that the court should consider—stage of litigation and the availability of alternative relief under the Clayton Act. Where a pending case is in an early stage of litigation and where injunctive relief can remedy the problem, the defendant local government may be able more easily to sustain its burden. Where a case is in more advanced stages of litigation or where injunctive relief is unavailable or incomplete, the burden would become more difficult. If a case has progressed to or beyond a jury verdict or district court judgment, a local government defendant would need compelling equities on its side to justify the application of this section to the pending case.

Conference Report of H.R. 6027, 98th Cong., 2d Sess., 130 Cong. Rec. H11,850-51 (daily ed. Oct. 10, 1984). "This Statement makes clear that as either of the two factors specifically mentioned in § 3(b) of the Act (stage of litigation and availability of alternative relief under the Clayton Act) moves towards weighing against retroactive application, the defendant's burden to establish that denial of such application would be inequitable becomes more difficult." *Jefferson Disposal,* 603 F.Supp. at 1132.

In addition to the two factors listed in the statute—the stage of the litigation and the availability of alternative relief under the Clayton Act—the legislative history indicates that the Court should expressly consider at least three other factors in deciding the equity question:

> In making its determination as to whether a local government should be protected against damages in a currently pending case, however, the statement of managers specifically directs the court

> to consider all relevant circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act—that is, the injunction remedy. But public policy requires that the court's inquiry in such instances must not be limited solely to antitrust considerations in cases brought against local governments. Among the other relevant factors, the court should properly consider:
>
> First, whether the local government was acting within its normal legislative, regulatory, executive, administrative, or judicial authority;
>
> [S]econd, the financial harm which a treble damage award could inflict on the municipality and its taxpayers; and
>
> [T]hird, whether the municipal action was predicated on or in furtherance of Federal or State laws, policies or regulations.

130 Cong. Rec. H12,187 (daily ed. Oct. 11, 1984) (remarks of Rep. Fish). *Accord, id.* at H12,184 (remarks of Rep. Lungren). *But see id.* at S14,368 (remarks of Sen. Metzenbaum), *reprinted in Miami International Realty Co. v. Town of Mt. Crested Butte*, 607 F.Supp. 448, 452 n.2 (D. Colo. 1985) (additional factors suggested on the House floor do not reflect Congressional intent). The Court will consider the statutory factors first, then those suggested by the legislative debates.

The Stage of Litigation. This litigation is now seven years old, but chronological age is deceptive in this instance. These suits were filed in May and June of 1978. The initial motions to dismiss were filed on November 29, 1978. Discovery then went forward on the class certification issues, and on the merits from February, 1979, forward. The class certification hearing was held in October 1979. The Court's ruling on class certification was issued

December 31, 1980. Both cases were essentially dormant during the period the Court had the class certification issues under advisement.

The December 31, 1980, Order also denied the motion to intervene in the *Campisi (Woolen)* suit, which had been filed by some of the *Whorton* plaintiffs. Those plaintiffs appealed in January 1981. The Fifth Circuit's opinion was issued on August 30, 1982. The mandate was filed in the district court on September 27, 1982. No proceedings, other than those related to the appeal, took place during the pendency of the appeal.

After this case was remanded, the *Campisi* plaintiffs moved to modify the class certification order to certify a damages class and the *Whorton* plaintiffs moved to decertify the class. All parties filed statements concerning the future course this litigation should take. In the ensuing 2 1/2 years, though, no party has made any real effort to complete discovery and ready the case for trial on the merits.

The past 5 1/2 years has not been devoted to preparation for trial on the merits. Completion of pretrial discovery would take at least another year. Because the status of these actions has not changed since the effective date of the Act, the Court need not determine whether the appropriate date for assessing the stage of the litigation is the date of this Opinion or the date the Act took effect, September 24, 1984—30 days before its date of enactment under § 6 of the Act. *See Jefferson Disposal*, 603 F.Supp. at 1132 n.16.

The failure to complete pretrial discovery before the effective date of the Act is a significant indication that § 3(a) should be applied retroactively. *See* 130 Cong. Rec. H12,186 (daily ed. Oct. 11, 1984) (remarks of Rep. Hyde) (the fact that pretrial discovery has not been completed "is an important distinction between the first and second sentences of section 3(b) for purposes of retroactive ap-

plication"); *id.* at H12,187 (remarks of Rep. Rodino) (uncompleted pretrial discovery "is the essential difference made in the conference report between pending cases generally, and pending cases where a jury verdict or district court decision has been rendered.") Congressman Hyde and Rodino were floor managers for the Act. Their statements during the course of debate are particularly useful in determining Congress' intent. *Miami International Realty*, 607 F.Supp. at 452 n.2. The failure to complete discovery before the effective date of the Act has particular weight where, as here, major discovery remains to be conducted.

The Availability of Alternative Relief Under the Clayton Act. "[I]n looking to the availability of alternative relief under the Clayton Act, the court would assess whether a plaintiff could recover damages from a private party and whether an injunction would be sufficient to halt continuing injury caused by an ongoing antitrust violation." 130 Cong. Rec. S13,105 (daily ed. Oct. 4, 1984) (remarks of Sen. Cranston). *Contra Miami International Realty*, 607 F.Supp. at 454 ("the potential damage liability of other defendants should not enter into the calculus used in determining whether to apply § 3 to pending cases").

Both criteria are met in these cases.[2] Each case has three defendants which are not local governments—Surtran Taxicabs, Yellow Cab of Dallas, and Fort Worth Cab & Baggage Co.—and which could be held liable for money damages, if not otherwise exempt from the antitrust laws.

Any continuing injury could be halted with injunctive relief prohibiting the cities from excluding the plaintiffs from the outbound taxicab market at the airport, or other appropriate prohibitions. "Injunctive remedies under § 16

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[2] As an alternative ground for dismissal, this analysis proceeds as though the state action exemption did not apply, thus making the availability of alternative relief a reality.

[of the Clayton Act] may be as broad as necessary to ensure that 'threatened loss or damage' does not materialize or that prior violations do not recur." *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 925 (9th Cir. 1975).

Exercise of Normal Regulatory Authority & Action in Furtherance of State Law. As discussed in Part I of this Opinion, the cities were plainly exercising their normal regulatory authority and acting in furtherance of state law in their implementation of taxicab service at the airport.

Financial Harm of a Treble Damages Award. The combined actions seek actual damages of $7,000,000, which would be trebled to $21,000,000. Such an award inevitably would have an adverse impact even on these major cities, but they would not be crippled in their provision of services or forced into bankruptcy. The burden would also be shared by the three nonmunicipal defendants. The magnitude of any adverse consequences falls far short of those suggested as benchmarks in the House:

> [W]hether an adverse impact would be felt by the unit of local government and its residents because of the antitrust damage award . . . is important because certainly we do not want the antitrust laws of our country to result in insolvency with respect to our local governments, nor to intrude in such a way on local government that we do not have people coming forth to serve on local government out of fear of potential antitrust suits.

130 Cong. Rec. H12,184 (daily ed. Oct. 11, 1984) (remarks of Rep. Lungren). At the same time, "[i]t cannot be denied that a judgment of that magnitude would have an adverse impact on any community in this country and would be totally at odds with the spirit and intent of the Act." *Jefferson Disposal,* 603 F.Supp. at 1135.

Conclusion. The Court determines, in light of all the circumstances, that it would be inequitable not be apply § 3(a) of the Local Government Antitrust Act of 1984, 15 U.S.C. § 35(a), to this case. Plaintiffs' claims under § 4 of the Clayton Act, 15 U.S.C. § 15, for damages, interest on damages, costs, and attorney's fees against the Cities of Dallas, Fort Worth, Grapevine and Irving are dismissed on this additional ground. This dismissal does not affect Plaintiffs' claims for costs and attorney's fees under § 16 of the Clayton Act, 15 U.S.C. § 26, as the Act does not encompass them. *Jefferson Disposal,* 603 F.Supp. at 1133 n. 19.

Under the express language of § 4(b) of the Act, the relief provided to private litigants is not available to the private defendants in these actions because they were commenced before the effective date of the Act.

III. Noerr-Pennington

The private defendants have moved for summary judgment on the ground that their activities are immune from antitrust scrutiny under the *Noerr-Pennington* doctrine. See *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965).

"The *Noerr-Pennington* doctrine provides an exception to antitrust liability enabling citizens or business entities to influence or to petition public officials to take official action that will harm or eliminate competition." *Affiliated Capital Corp. v. City of Houston,* 735 F.2d 1555, 1566 (5th Cir. 1984) (en banc), *petition for cert. filed,* 105 S. Ct. 1164 (1984). The *Noerr-Pennington* doctrine stems from the First Amendment's guarantee of a right to assemble and petition the government. "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme,

itself violative of the Sherman Act." *Pennington*, 381 U.S. at 670. As the Court later said:

> [I]t would be destructive of rights of association and of petition to hold that groups with common interest may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interest vis-a-vis their competitors.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972).

However, "a defendant cannot rely on *Noerr-Pennington* immunity when the activity to influence government action is a mere sham to hide what is essentially an attempt to interfere with a competitor's business." *Affiliated Capital*, 735 F.2d at 1567. This sham exception may manifest itself in a variety of ways. *See Coastal States Marketing v. Hunt*, 694 F.2d 1358, 1371 n.42 (5th Cir. 1983); ABA Antitrust Section, Antitrust Law Developments 615-18 (2d ed. 1984). The plaintiffs in the instant actions have not suggested what variety of the sham exception they believe is applicable here.

Recognizing that "[a petitioning party] should enjoy petitioning immunity from the antitrust laws so long as a genuine desire for [governmental] relief is a significant motivating factor underlying [the petitioning activity]," the Fifth Circuit has said that the sham exception is initially established by a showing that the defendant's petitioning activity was "substantially" motivated by impermissible anticompetitive factors. If this showing is made, the defendant must demonstrate to the satisfaction of the trier of fact that the defendant's petitioning activity was "substantially" motivated by a hope of governmental relief. If the defendant discharges this burden, "[n]othing more is

required to bring the case within the immunity." *Coastal States Marketing,* 694 F.2d at 1372 & n.45.

The summary judgment record in this case discloses no genuine issue as to any facts material to determination of the *Noerr-Pennington* question. The undisputed facts demonstrate that the private defendants are entitled to summary judgment by virtue of the *Noerr-Pennington* doctrine. The same comments made by the Fifth Circuit in *Independent Taxicab* apply here:

> Viewing the record in the light most favorable to [plaintiffs], the most that can be said is that [the private defendants] secured from the [Regional Airport Board] an exclusive concession whose anticompetitive effects stem primarily from a valid municipal, and vicariously state, policy. It would be anomalous to hold on the one hand that government can contract with private entities to effectuate valid, albeit anticompetitive, policies, while holding on the other hand that private entities cannot petition government to participate in the public endeavor.

760 F.2d at 613.

> This result is compelled if *Noerr-Pennington* protection is to have meaning in the context of agreements with the government. First Amendment petitioning privileges would indeed be hollow if upon achieving a petitioned-for end the petitioner were then subjected to antitrust liability for his success.

Greenwood Utilities Commission v. Mississippi Power Company, 751 F.2d 1484, 1505 (5th Cir. 1985).

The single-operator concept, which is at the heart of Plaintiffs' claims, apparently originated in an independent consultant's report prepared for the Cities of Dallas and Fort Worth in 1964. Even if the private defendants ac-

tively lobbied for implementation of the single-operator concept and vigorously pressed their views concerning criteria the successful bidder would have to meet in such areas as minimum insurance coverage and fleet size, *Noerr-Pennington* would apply because these activities plainly were not a sham. Plaintiffs' alleged injuries were caused by the governmental action which the private defendants genuinely attempted to secure and succeeded in securing. *See In re Airport Car Rental Antitrust Litigation,* 521 F.Supp. 568, 587-90 (N.D. Cal. 1981), *aff'd,* 693 F.2d 84 (9th Cir. 1982), *cert. denied,* 103 S.Ct. 3114 (1983).

Plaintiffs' contention that the private defendants' actions fall within the co-conspirator exception to the *Noerr-Pennington* doctrine is without merit. Viewing the summary judgment record in the light most favorable to plaintiffs, the most that has been shown is mere adoption by the cities of some of the private defendants' proposals. The record shows that while some of the private defendants' suggestions were adopted, the general concept and specific details of taxicab service at the airport were closely scrutinized and extensively debated by a variety of public and private entities. There is no evidence of a conspiracy. See *Affiliated Capital Corp. v. City of Houston,* 519 F.Supp. 991, 1016-23 (S.D. Tex. 1981), *adopted in relevant part,* 735 F.2d at 1567 (applying co-conspirator exception where the evidence revealed "active participation and orchestration by public officials in an anticompetitive agreement").

The Court concludes that the plaintiffs' claims against the private defendants should also be dismissed as barred under the *Noerr-Pennington* doctrine.

IV. The Civil Rights Claim

In their First Amended Complaint, filed May 17, 1985, the *Whorton* plaintiffs allege that the defendants' conduct constituted "a discrimination against the rights of the Plaintiffs under the Civil Rights Act and the Constitution

of the United States." *Id.* ¶ 17, at 9. The *Whorton* plaintiffs have not further elaborated on this cause of action in any document filed with the Court, nor have they identified what statute they purport to sue under.

This alleged civil rights claim based on discrimination has no plausible foundation and is wholly insubstantial and frivolous. It is dismissed for want of subject matter jurisdiction. Rule 12(b)(1). *See Williamson v. Tucker,* 632 F.2d 579, 590-91 (5th Cir. 1980) (discussion of applicable standards). In the alternative, the civil rights claim is dismissed for failure to state a claim upon which relief can be granted. Rule 12(b)(6).

V. Summary of Holdings

1. Plaintiffs' antitrust claims are DISMISSED because the Defendants' challenged activities are immune from scrutiny under the antitrust laws by virtue of the state action exemption.

2. Plaintiffs' antitrust claims under § 4 of the Clayton Act for damages, interest on damages, costs and attorney's fees against the Defendant cities are DISMISSED under § 3 of the Local Government Antitrust Act of 1984 because, in light of all the circumstances, it would be inequitable not to apply § 3(a) of the Act to this case.

3. Plaintiffs' antitrust claims against the private Defendants are DISMISSED as barred under the *Noerr-Pennington* doctrine.

4. The *Whorton* Plaintiffs' civil rights claim is DISMISSED for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

5. This Order disposes of all pending claims in this litigation. Judgment will be entered accordingly.

It is so ORDERED.

ENTERED this 8th day of August, 1985.

/s/ MARY LOU ROBINSON
MARY LOU ROBINSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-78-609
CONSOLIDATED WITH:
CIVIL ACTION NO. CA-3-78-745

JOHN WOOLEN, *et al.*

Plaintiffs,

v.

SURTRAN TAXICABS, INC., *et al.*,

Defendants.

FILED
AUG 8 1985

ORDER OF DISMISSAL

Civil action nos. 3-78-609 and 3-78-745 are dismissed.

It is so ORDERED.

ENTERED this 8th day of August, 1985.

/s/ MARY LOU ROBINSON
MARY LOU ROBINSON
United States District Judge

APPENDIX B

LOCAL GOVERNMENT ANTITRUST ACT OF 1984

PUBLIC LAW 98-544 [H.R. 6027]; October 24, 1984

LOCAL GOVERNMENT ANTITRUST ACT OF 1984

For Legislative History of Act, see Pamphlet No. 10A
An Act to clarify the application of the Clayton Act to the official conduct of local government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Local Government Antitrust Act of 1984".

SEC. 2. For purposes of this Act—

(1) the term "local government" means—

(A) a city,county, parish, town, township, village, or any other general function governmental unit established by State law, or

(B) a school district, sanitary district, or any other special function governmental unit established by State law in one or more States,

(2) the term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(A)), but does not include any local government as defined in paragraph (1) of this section, and

(3) the term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

SEC. 3. (a) No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

SEC. 4. (a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply with respect to cases commenced before the effective date of this Act.

SEC. 5. Section 510 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1985 (Public Law 98-411), is repealed.

SEC. 6. This Act shall take effect thirty days before the date of the enactment of this Act.

Approved October 24, 1984.

APPENDIX C

STATE STATUTES

The history and content of the multiple statutes and bills that produced the 1983, and later the 1985, Texas legislation are more fully set forth in the Whorton Appellants' Reply Brief and attached Statutory Appendix in the Fifth Circuit. Reprinted here are some of the parts most relevant to this petition for certiorari.

App. Page

I. 1983 Tex. Gen. Laws, ch. 626, 4015-4022, Obstruction to Air Navigation Control Act and Taxicab Licensing Act. 31a

II. 1983 Tex. Gen. Laws, ch. 978, 5322-5324, Municipal Airports—Joint Boards—Contracts, Leases, and Other Arrangements—Use of Property 32a

III. 1985 Tex. Gen. Laws, ch. 268, 2322-24, Taxicabs-Operation at Airports-Regulation. 34a

IV. Texas Municipal Airports Act, TEX. REV. CIV. STAT. ANN., art. 46d-4(a)(2), art. 46d-14(d)6, 7, and note (Vernon Supp. 1985). ... 37a

V. Texas Motor Bus Act, TEX. REV. CIV. STAT. ANN., art. 911a, §1(c) (Vernon Sup. 1985). 41a

APP. C-I.

1983 TEX. GEN. LAWS, CH. 626, 4015-4022, *OBSTRUCTION TO AIR NAVIGATION CONTROL ACT AND TAXICAB LICENSING*

CHAPTER 626

S. B. NO. 960

AN ACT

relating to the regulation of obstructions to air navigation of taxicabs serving certain airports; . . . adding Subdivisions (6) and (7) to Subsection (d), Section 14, Municipal Airports Act (Article 46d-14, Vernon's Texas Civil Statutes).

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

* * * *

SECTION 2. Subsection (d), Section 14, Municipal Airports Act (Article 46d-14, Vernon's Texas Civil Statutes), is amended by adding[11] Subdivisions (6) and (7) to read as follows:

"(6) Taxicab Licensing Notwithstanding any contrary provisions in H.B. 593, Acts of the 68th Legislature, Regular Session, 1983,[12] a joint airport board established pur-

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[11] Vernon's Ann. Civ. St. art. 46d-14, subsec. 12. Chapter 263. (d). subds. (6&7).

Additions in text indicated by underline; deletions by [brackets]

[12] Passed the Senate on April 14, 1983: Yeas 30, Nays 0; May 27, 1983, Senate refused to concur in House amendments and requested appointment of Conference Committee; May 27, 1983, House granted request of the Senate; May 28, 1983, Senate adopted Conference Committee Report by a viva-voce vote; passed the House, with amendments, on May 25, 1983, by a non-record vote, May 27, 1983, House granted request of the Senate for appointment of Conference Committee; May 30, 1983, House adopted Conference Committee Report by a non-record

suant to Chapter 114, Acts of the 50th Legtislature, Regular Session, 1947, as amended (Article 46d-14, Vernon's Texas Civil Statutes), shall have power to license taxicabs picking up passengers at or delivering passengers to the airport.

"(7) Regulations. Any resolutions, rules, regulations, or orders of the joint board dealing with subjects authorized by Subdivision (6) of this subsection become effective only upon approval of the governing bodies of the constituent public agencies. Upon the approval, the resolutions, rules, regulations, or orders of the joint board have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations, or orders of each public agency would have in its own territory or jurisdiction."

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vote.

Filed without signature June 19, 1983.

Effective Sept. 1, 1983.

APP. C-II

1983 TEX. GEN. LAWS, CH. 978, 5322-5324, MUNICIPAL AIRPORTS—JOINT BOARDS—CONTRACTS, LEASES, AND OTHER ARRANGEMENTS—USE OF PROPERTY

CHAPTER 978

H. B. No. 2009

AN ACT

relating to contracts, leases, and other arrangements for the use and occupancy of airport property entered into by joint boards under the Municipal Airports Act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsection (d), Section 14, Municipal Airports Act (Article 46d-14, Vernon's Texas Civil Statutes), is amended to read as follows:

(d) Limitations on Joint Board.

. . . .

(4) Disposal of Real Property. Use of Property by Others. The joint board shall not dispose of any airport, air navigation facility or real property under its jurisdiction except with the consent of the governing bodies of its constituent public agencies. [provided that] However, the joint board may, without such consent, enter into [the contract, lease or other arrangements contemplated by Section 4 of this Act] contracts, leases, or other arrangements for the use and occupancy by others of airport lands and personal property for the purposes specified in Section 4 of this Act upon such terms, for such rentals, revenues, and payments, and for such period or periods of years and with such options of renewal, as shall be approved by the joint board. It is provided, however, that if any such con-

tract, lease, or other arrangement shall be for a term, including any renewal or option terms, in excess of 40 years, the same shall be subject to the approval of each of the governing bodies of the constituent public agencies of the joint board unless the necessity for such approval is waived by resolution of each such governing body.

SECTION 2.[27] Any and all contracts, leases, or other arrangements for the use or occupancy of airport property executed by joint boards created under the Municipal Airports Act (Article 46d-1 et seq., Vernon's Texas Civil Statutes), and all provisions thereof, and executed prior to the effective date of this Act, are hereby validated and confirmed and the same are fully effective and represent the lawful agreements and undertakings of joint boards in accordance with the terms thereof.

SECTION 3. This Act takes effect September 1, 1983.

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[27] Vernon's Ann. Civ. St. art. 46d-14 note.

Passed by the House on April 21, 1983: Yeas 133, Nays 1, 1 present, not voting; passed by the Senate on May 19, 1983; Yeas 29, Nays 0.

Approved June 19, 1983.

Effective Sept. 1, 1983.

Additions in text indicated by underline; deletions by [brackets]

APP. C-III

Ch. 268, TEXAS 69th LEGISLATURE—REGULAR SESSION (1985)

TAXICABS—OPERATION AT AIRPORTS—REGULATION

CHAPTER 268

S. B. No. 748

AN ACT

relating to the regulation of taxicabs operating at certain airports; amending Subsection (c), Section 1, Chapter 270, Acts of the 40th Legislature, Regular Session, 1927, as amended, and Subdivision (6), Subsection (d), Section 14, Chapter 114, Acts of the 50th Legislature, Regular Session, 1947, as amended (Articles 911a and 46d-14, Vernon's Texas Civil Statutes).

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsection (c), Section 1, Chapter 270, Acts of the 40th Legislature, Regular Session, 1927, as amended (Article 911a, Vernon's Texas Civil Statutes), is amended[78] to read as follows:

"(c) The term 'Motor Bus Company' when used in this Act means every corporation or persons as herein defined, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled passenger vehicle not usually operated on or over rails, and engaged in the business of transporting persons for compensation or hire over the public highways within the State of Texas, whether operating over fixed routes or fixed schedules, or otherwise.

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[78] Vernon's Ann.Civ.St. art. 911a, § 1, subsec. (c).

However, the term 'Motor Bus Company' as used in this Act shall not include:

"(1) corporations or persons, their lessees, trustees, or receivers, or trustees appointed by any court whatsoever, insofar as they own, control, operate, or manage motor propelled passenger vehicles operated wholly within the limits of any incorporated town or city, and the suburbs thereof, whether separately incorporated or otherwise;

. . .

"(3) corporations or persons, their lessees, trustees, or receivers, or trustees appointed by any court whatsoever, insofar as they own, control, operate, or manage motor propelled taxicabs designed for carrying no more then five passengers [(permits, licenses, or certificates issued prior to June 1, 1983, would not be affected by the provisions of this exclusion. Such taxicabs are motor buses only when they operate to or from an airport established pursuant to Section 14, Chapter 114, Acts of the 50th Legislature, 1947, as amended (Article 46d-14 Vernon's Texas Civil Statutes)]."

SECTION 2. Subdivision (6), Subsection (d), Section 14, Chapter 114, Acts of the 50th Legislature, Regular Session, 1947 (Article 46d-14, Vernon's Texas Civil Statutes), is amended[79] to read as follows:

"(6) Taxicab Licensing. A [Notwithstanding any contrary provisions in H.R. 593, Acts of the 68th Legislature, Regular Session 1983 a] joint airport board established pursuant to this Act [Chapter 114 Acts of the 50th Legislature Regular Session 1917 as amended (Article 46d-14 Vernon's Texas Civil Statutes)] shall have power to license taxicabs picking up passengers at or delivering passengers to the airport and to charge and collect fees with respect to the issuance of licenses under this subdivision."

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[79] Vernon's Ann.Civ.St. art. 46d-14, subsec. (d).

SECTION 3.[80] A permit for the operation of a taxicab that was issued by the Railroad Commission of Texas under Chapter 270, Acts of the 40th Legislature, Regular Session, 1927, as amended (Article 911a, Vernon's Texas Civil Statutes), before the effective date of this Act, is valid for the period for which the permit was issued.

* * * *

Passed the Senate on April 30, 1985; Yeas 22, Nays 0; passed the House on May 17, 1985; Yeas 117, Nays 0; three present not voting.

Approved June 5, 1985.

Effective June 5, 1985.

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[80] Vernon's Ann.Civ.St. art. 911a note.

(Editorial Note: [~~strike-outs~~] have been converted to [ ] for readibility so that legislative deletions are indicated by [ ].)

APP. C-IV

TEXAS MUNICIPAL AIRPORTS ACT
(As Amended, 1985)

Art. 46d—4. Operation and use privileges

(a) Under Municipal Operation. In operating an airport or air navigation facility owned, leased or controlled by a municipality, such municipality may, except as may be limited by the terms and conditions of any grant, loan, or agreement pursuant to Section 12 of this Act,[1] enter into contracts, leases and other arrangements for a term not exceeding forty (40) years with any persons:

(1) granting the privilege of using or improving such airport or air navigation facility or any portion or facility thereof, or space therein for commercial purposes;

(2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport or air navigation facility; or

(3) making available services to be furnished by the municipality or its agents at such airport or air navigation facility.

In each case the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services, which shall be reasonable and uniform for the same class of privilege or service and shall be established with due regard to the property and improvements used and the expenses of operation to the municipality.

(b) Under Other Operation. Except as may be limited by the terms and conditions of any grant, loan, or agreement pursuant to Section 12 of this Act, a municipality may be contract, lease or other arrangement, upon a con-

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[1] Article 46d-12.

sideration fixed by it, grant to any qualified person for a term not to exceed forty (40) years the privilege of operating, as agent of the municipality or otherwise, any airport owned or controlled by the municipality; provided that no such person shall be granted any authority to operate the airport other than a public airport or to enter into any contracts, leases or other agreements in connection with the operation of the airport which the municipality might not have undertaken under Subsection (a) of this Section.

Acts 1947, 50th Leg., p. 185, ch. 114, § 4.

* * * *

(d) Limitations on Joint Board.

* * * *

(4) Disposal of Real Property. Use of Property by Others. The joint board shall not dispose of any airport, air navigation facility or real property under its jurisdiction except with the consent of the governing bodies of its constituent public agencies. However, the joint board may, without such consent, enter into contracts, leases, or other arrangements for the use and occupancy by others of airport lands and personal property for the purposes specified in Section 4 of this Act upon such terms, for such rentals, revenues, and payments, and for such period or periods of years and with such options of renewal, as shall be approved by the joint board. It is provided, however, that if any such contract, lease, or other arrangement shall be for a term, including any renewal or option terms, in excess of 40 year, the same shall be subject to the approval of each of the governing bodies of the constituent public agencies of the joint board unless the necessity for such approval is waived by resolution of each such governing body.

(5) Police Regulations. Any resolutions, rules, regulations, or orders of the joint board dealing with subjects authorized by Section 7 of this Act shall become effective only upon approval of the governing bodies of the constituent public agencies provided that upon such approval, the resolutions, rules, regulations or orders of the joint board shall have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations or orders of each public agency would have in its own territory or jurisdiction.

(6) Taxicab Licensing. A joint airport board established pursuant to this Act shall have power to license taxicabs picking up passengers at or delivering passengers to the airport and to charge and collect fees with respect to the issuance of licenses under this subdivision.

(7) Regulations. Any resolutions, rules, regulations, or orders of the joint board dealing with subjects authorized by Subdivision (6) of this subsection become effective only upon approval of the governing bodies of the constituent public agencies. Upon the approval, the resolutions, rules, regulations, or orders of the joint board have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations, or orders of each public agency would have in its own territory or jurisdiction.

* * * * * * * * * * *

Subsecs. (1) to (c) amended by Acts 1981, 67th Leg., p. 852, ch. 300, § 2, eff. Aug. 31, 1984;
Subsec. (d) amended by Acts 1983, 68th Leg., p. 5322, ch. 978, § 1, eff. Sept. 1, 1983;
Subsec. (d)(6), (7) added by Acts 1983, 68th Leg., p. 4022, ch. 626, § 2, eff. Sept. 1, 1983;
Subsec. (d)(6) amended by Acts 1985, 69th Leg., p. 2323, ch. 268, § 2, eff. June 5, 1985.

Section 2 of Acts 1983, 68th Leg., p. 5323, ch. 978, provided:

"Any and all contracts, leases, or other arrangements for the use or occupancy of airport property executed by joint boards created under the Municipal Airports Act (Article 46d-1 et seq., Vernon's Texas Civil Statutes), and all provisions thereof, and executed prior to the effective date of this Act, are hereby validated and confirmed and the same are fully effective and represent the lawful agreements and undertakings of joint boards in accordance with the terms thereof."

APP. C-V

THE MOTOR BUS ACT, ARTICLE 911a MOTOR BUS TRANSPORTATION AND REGULATION BY RAILROAD COMMISSION, AS AMENDED, JUNE 5, 1985

Art. 911a. Motor bus transportation and regulation by Railroad Commission Definitions

Sec. 1.

* * * * * * * * * * *

(c) The term "Motor Bus Company" when used in this Act means every corporation or persons as herein defined, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled passenger vehicle not usually operated on or over rails, and engaged in the business of transporting persons for compensation or hire over the public highways within the State of Texas, whether operating over fixed routes or fixed schedules, or otherwise. However, the term "Motor Bus Company" as used in this Act shall not include:

(4) corporations or persons, their lessees, trustees, or receivers, or trustees appointed by any court whatsoever, insofar as they own, control, operate, or manage motor propelled taxicabs designed for carrying no more than five passengers.

* * * * * * * * * * *

Sec. 1(c) amended by Acts 1981, 67th Leg., p. 294, ch. 118, § 1, eff. May 13, 1981: Acts 1983, 68th Leg., p. 1180, ch. 263, § 14, eff. Sept. 1, 1983; Acts 1983, 68th Leg., 1st C.S., p. 13, ch. 2, § 1, eff. Sept. 1, 1983; Acts 1985, 69th Leg., p. 186, ch. 54, § 1, eff. April 30, 1985; Acts 1985, 69th Leg., p. 2322, ch. 268, § 1, eff. June 5, 1985.

* * * * * * * * * * *

APPENDIX D

STATE LEGISLATIVE HISTORY EXCERPT.

OFFICE OF THE GOVERNOR
STATE CAPITOL
AUSTIN, TEXAS 78711
January 11, 1985

State of Texas
County of Travis

AFFIDAVIT

Before me the undersigned authority on this day personally appeared Glen David Mason who stated and deposed the following:

"I, Glen David Mason, assistant press secretary, Office of the Governor of the State of Texas, affirm and certify that the attached copy of a press release dated May 27, 1983, from the Office of Governor Mark White is a true and correct copy of said press release as made available to the press on or about May 27, 1983."

/s/ GLEN DAVID MASON
GLEN DAVID MASON

Subscribed and sworn this 11th day of January, 1985.

/s/ UNREADABLE
Notary Public in and for the State of Texas, my commission expires 08-03-85

Office of Governor Mark White

May 27, 1983

I am very pleased that the House and Senate today acted quickly to make changes to correct problems in the Railroad Commission bill. These revisions overcome the objections and concerns which I expressed in meetings yesterday and today with members of the Commission, Legislators and others.

Specifically, my concern that the original bill placed the State in the position of legislating a monopoly for a single taxi company, while preventing free market competition, has been sufficiently addressed. An additional problem, which would have enabled members of the Railroad Commission to own stock in railroad companies, creating the potential for a clear conflict of interest, has now been corrected.

Rumors that there would be a veto of this legislation should be put to rest.

I appreciate the cooperation of the Speaker and Lieutenant Governor and the members of the House and Senate to deal so expeditiously with this matter.